STATE OF NEW YORK

OFFICE OF RENEWABLE ENERGY SITING

ORES DMM Matter Number 21-00962 – Application of TRACY SOLAR ENERGY CENTER, LLC, for a Major Renewable Energy Facility Siting Permit Pursuant to Section 94-c of the New York State Executive Law to Develop, Design, Construct, Operate, Maintain, and Decommission a 119-Megawatt (MW) Solar Energy Facility Located in the Towns of Orleans and Clayton, Jefferson County.

RULING OF THE ADMINISTRATIVE LAW JUDGES ON ISSUES AND PARTY STATUS, AND ORDER OF DISPOSITION

(Issued December 1, 2022)

DAWN MacKILLOP-SOLLER and ERIKA BERGEN, Administrative Law Judges:

I. BACKGROUND AND PROCEEDINGS

On September 13, 2021, Tracy Solar Energy Center, LLC (applicant), applied pursuant to Executive Law § 94-c to the New York State Office of Renewable Energy Siting (Office or ORES) for a permit to construct and operate a 119-megawatt (MW) solar energy facility (facility or project) in the Towns of Orleans and Clayton,

Jefferson County.[1] In addition to photovoltaic (PV) panels and their tracker racking systems, the facility would include fencing, gates, a collection substation, inverters, an operations and maintenance (O&M) building, buried electric collection lines, electrical interconnection facilities, and access roads. To supply electricity to New York State's bulk electric transmission system, the facility would interconnect to the existing National Grid's Thousand Island to Lyme 115-kV transmission line through a new point of interconnection (POI) switchyard in the Town of Orleans.[2]

After receiving notices of incomplete application on November 12, 2021, and March 21, 2022, applicant supplemented its application on January 19, 2022, and May 6, 2022. On June 15, 2022, ORES staff declared the application to be complete and in compliance with Executive Law § 94-c(5)(b) and 19 NYCRR 900-4.1(c) and (g).[3]

On August 12, 2022, the Office issued a draft siting permit for the facility, which was posted for public comment on ORES's website.[4] Also issued on that same date and posted on the

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[1] See DMM Item No. 3, letter from applicant to ORES filing application for a siting permit pursuant to Executive Law § 94-c and 19 NYCRR part 900 and exhibits dated September 10, 2021.

[2] See DMM Item No. 3, application exhibit 2: Overview and Public Involvement at 1-3.

[3] See DMM Item No. 22, notice of incomplete application, November 12, 2021; DMM Item No. 24, applicant response to notice of incomplete application, January 19, 2022; DMM Item No. 30, notice of incomplete application, March 21, 2022; DMM Item No. 32, applicant response to notice of incomplete application, May 6, 2022; DMM Item No. 34, notice of complete application, June 15, 2022.

[4] See DMM Item No. 36, draft siting permit for a major renewable energy facility in the Towns of Orleans and

New York State Department of Public Service (DPS) document and matter management (DMM) system was a combined notice of availability of draft permit conditions, public comment period and public comment hearing, and commencement of the issues determination procedure (combined notice) for this matter.[5] Applicant published the combined notice in the Thousand Islands Sun and Watertown Daily Times newspapers beginning on September 14, 2022, and in the Watertown Pennysaver on September 16, 2022. Applicant served the combined notice on the party list and persons and entities required to receive copies of the application pursuant to 19 NYCRR 900-1.6(a) or notice of the application pursuant to 19 NYCRR 900-1.6(c).[6]

The combined notice advised that a public comment hearing on the draft permit would be held on October 12, 2022, at the Clayton Opera House, 403 Riverside Drive, Clayton, New York, with written comments accepted until October 14, 2022. Pursuant to the combined notice, petitions for party status to participate in the issues conference and, if necessary, the adjudicatory hearing, were to be filed on or before October 17, 2022. In addition, the combined notice established October 17, 2022, as the date for submission of applicant's issues statement, and the municipal

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Clayton, Jefferson County, issued to Tracy Solar Energy Center, LLC, accessible at https://ores.ny.gov/permit-applications.

[5] See 19 NYCRR 900-8.2(d); DMM Item No. 37, combined notice of availability of draft permit conditions, public comment period and public comment hearing, and commencement of issues determination procedure.

[6] See DMM Item Nos. 40 and 42, affidavits of service; DMM Item No. 41, affidavits of publication.

statements of facility compliance with applicable local laws and regulations regarding the environment or public health and safety.[7]

II. Summary of Public Comments

In accordance with the combined notice, the public comment hearing convened as scheduled on October 12, 2022, at 5:00 p.m. at the Clayton Opera House. Approximately 22 individuals were in attendance, including staff from ORES. One individual spoke in support of the proposed project, referencing the positive effects of using local labor to complete the project. A different speaker spoke about not endorsing the project in its preliminary stages but hoping to do so in the future. An attorney for the Town of Clayton spoke generally concerning the insufficiency of the evidence for ORES to "waive local law or to find that adverse impacts have been identified, avoided or mitigated" and take "a hard look" at the potential impacts of the project and to consider "all pertinent social, environmental and economic factors . . . before rendering a final permit decision."[8]

As of the close of the public comment period on October 17, 2022, two written comments opposing the project from the same individual were received — on October 7 and 14, 2022. The written comments proposed a condition for applicant to provide equitable mitigation "on a one-to-one (1:1) basis, that is: one acre developed, one acre mitigated" for environmental, agricultural, biological, and societal impacts of the facility and other local solar facilities. An additional focus was the potential negative

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[7] See 19 NYCRR 900-8.2(d)(3), 900-8.4(d), and 900-8.4(b).

[8] See DMM Item No. 49 at 7-13.

impacts of the project on the grassland bird habitat of northwestern Jefferson County — the Perch Lake Complex Important Bird Area. The written comments also requested enforcement of the Town of Clayton's Solar Law consistent with Clayton's comprehensive plan and further focused on socioeconomic effects in connection with the host community benefits, requesting review of limiting an annual school scholarship to ten years instead of "for the life of the project," and of capping estimated construction payroll and expenditures at "approximately 1% of the total expenditure."[9]

III. Petitions for Party Status and Proposed Issues for Adjudication

• Town of Orleans

In accordance with the combined notice, on October 17, 2022, the Town of Orleans submitted a statement of compliance with local laws and regulations but not a petition for party status. In its statement of local law compliance, the Town concludes adjudication is not necessary since the issues raised are neither substantive nor significant. The Town acknowledges that the facility as proposed does not comply with the Town's regulations and local laws, specifically Town Code § 6(C)(1) (maximum height requirements of 35 feet), § 6(C)(2) (setback requirements of 30 feet/front yards and 20 feet/side yards and rear yards), visual screening (screening measures to mitigate visual impacts of the Facility), and decommissioning (financial security or two bonds issued for each town in amounts consistent with the infrastructure

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9 See DMM Public Comment Nos. 2 and 3.

therein). However, the Town accepts all the proposed waivers of the Town Code provisions on the condition that they not apply to future projects or reviews. The Town also agrees to continue to work with applicant.[10]

In a stipulation filed with the office on November 28, 2022, applicant and the Town stated that they resolved several of these potential issues. First, with respect to screening, applicant and the Town agreed that the "Final Visual Impacts Minimization and Mitigation Plan (VIMMP) satisfies the intent of the Orleans Solar Energy Law Section 6(C)(5)" on conditions that include applicant adding visual screening to certain areas. They further agreed that this plan will be "submitted as a compliance filing" as per site specific condition (SSC) 6(c). Second, regarding decommissioning, applicant and the Town agreed that financial security for decommissioning and site restoration activities for the Town "shall be in the form of a bond" established by applicant "to be held by the Town of Orleans and shall represent that proportion of the facility components located within the Town of Orleans." Finally, with respect to structure height, the stipulation states a recommendation to correct condition 4(b)(1) of the draft siting permit to read as follows:

> Based upon the record in this case, the Office respectfully approves partial relief from the height restriction in § (6)(C)(1) of the Town of Orleans Solar Energy Law with respect to two (2) 65-foot lightning masts within the Facility collection substation and POI switchyard and one A-frame structure (with 2 lightning masts not exceeding 65

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[10] See DMM Item No. 45, Town of Orleans statement of compliance, town comments, and resolution of the board at 3-8.

feet in height) supporting the Facility transmission interconnection to the National Grid 115 kV Thousand Islands-to-Coffeen Street Transmission Line as described in Exhibit 24 (DMM Item No. 32 at 24-13) and shown on sheets PS301 and PS302 of Appendix 5-A Design Drawings (DMM Item No. 24).[11]

Applicant filed another stipulation on November 28, 2022, stating the agreement of ORES staff to the above correction to condition 4(b)(1) of the draft siting permit.[12] Therefore, based on the agreement of the parties, the local law waiver issues are resolved. Accordingly, no adjudicable issues exist that require an evidentiary hearing. Condition 4(b)(1) of the draft siting permit should be revised in accordance with the parties' agreements.

• Applicant

On October 17, 2022, applicant timely filed a statement of issues. Applicant stated its acceptance of the conditions of the draft permit but requested clarification from ORES regarding two SSCs, specifically to allow a phased notice to proceed approach to construction and to address wetland mitigation for the 0.02 acres of State-regulated projected wetland impacts resulting from this project. Applicant also requests that any denial of

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[11] See DMM Item No. 54, revised executed stipulation between applicant and the Town of Orleans, November 28, 2022, at 1-2.

[12] See DMM Item No. 54, executed stipulation of ORES staff and applicant, November 28, 2022, at 1.

these conditions constitute a substantive and significant dispute.[13]

• Town of Clayton

On October 17, 2022, the Town of Clayton timely filed its petition for full party status, issues statement, and statement of noncompliance with local law seeking to adjudicate several issues. If full party status is not awarded, the Town seeks amicus status in the alternative. The issues the Town seeks to adjudicate are:

- Whether ORES exceeded the narrow scope of it delegated power to waive local laws by failing to adhere to the statutory and regulatory standards for waiver;
- Whether ORES committed errors of fact and law, and abused its discretion in holding certain provisions of local law are unreasonably burdensome in light of the Climate Leadership and Community Protection Act (CLCPA) targets and the environmental benefits of the proposed major renewable energy facility;
- Whether ORES and applicant have accurately quantified the environmental benefits of the proposed facility;
- Whether the draft permit mitigates or avoids visual impacts as required by local law, or whether additional mitigation measures are required;
- Whether the application contains an accurate assessment of decommissioning costs, and whether the draft permit provides for adequate decommissioning security;

[13] See DMM Item No. 48, applicant's issues statement and requests for clarification.

- Whether the application contains an adequate emergency response plan;
- Whether the draft permit adequately protects local roads from potential damage during construction;
- Whether the draft permit fails to provide specific guidance for proof of host community benefits; and
- Whether the draft permit fails to avoid or mitigate adverse impacts to avian species in violation of local planning and environmental protection priorities.[14]

- Applicant and ORES Staff Responses

On November 1, 2022, applicant filed its response to issues statement, party status request, municipal statements of compliance, and public comments on the draft permit. On the same day, ORES staff filed its response to petitions for party status, the statement of issues by applicant, and the statement of compliance with local laws and regulations.

IV. Issues Determination Procedure

This ruling addresses issues that were raised by the parties or potential parties during the issues determination procedure under 19 NYCRR 900-8.3(b). To issue a final siting permit pursuant to Executive Law § 94-c, ORES must make a finding that the proposed project, together with any applicable provisions of the uniform standards and conditions (USCs), necessary SSCs, and applicable compliance filings:

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[14] See DMM Item No. 46, Town of Clayton request for party status, issues statement, and statement of compliance with local law (petition).

1) complies with Executive Law § 94-c and applicable provisions of the Office's regulations at 19 NYCRR part 900;
2) complies with substantive provisions of applicable State laws and regulations;
3) complies with substantive provisions of applicable local laws and ordinances, except those provisions the Office has elected not to apply based on a finding that they are unreasonably burdensome in view of the Climate Leadership and Community Protection Act targets and the environmental benefits of the facility;
4) avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility; and
5) achieves a net conservation benefit with respect to any impacted threatened or endangered species.

In making the required finding, the Office is directed to consider New York's Climate Leadership and Community Protection Act (CLCPA) targets and the environmental benefits of the proposed major renewable energy facility.[15]

The purpose of the issues determination procedures is to determine whether substantive and significant issues of fact related to the findings that the Office must make on an

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[15] See ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Decision of the Executive Director, Jan. 13, 2022, at 8-9, citing Executive Law § 94-c(3)(b)-(d), (5)(e); see also Climate Leadership and Community Protection Act (CLCPA), L 2019, ch 106, § 7.

application require adjudication and, if not, to resolve legal issues related to those findings. Specifically, pursuant to 19 NYCRR 900-8.3(b)(2), the purpose of the issues determination procedure is: (i) to receive argument on whether party status should be granted to any petitioner; (ii) to narrow or resolve disputed issues of fact without resort to taking testimony; (iii) to receive argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues; (iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to receive argument on the merits of those issues; and (v) to decide any pending motions.

The procedure under 19 NYCRR 900-8.3(b) is a form of summary judgment. The initial inquiry is whether a party challenging an application or draft siting permit has raised a substantive and significant factual issue requiring adjudication. A party seeking to litigate a substantive and significant factual dispute must further demonstrate the existence of a triable issue of fact through a sufficient offer of proof, usually through the proffer of expert evidence.[16] If the ALJ determines that a party has raised a substantive and significant triable issue of fact, the ALJ will define the issue as precisely as possible, set the

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[16] See 19 NYCRR 900-8.4(c)(2)(ii); ORES DMM Matter No. 21-01108, Matter of Hecate Energy Cider Solar LLC, Decision of the Executive Director, July 25, 2022, at 8; ORES DMM Matter No. 21-00026, Matter of Heritage Wind LLC, Interim Decision of the Executive Director, Sept. 27, 2021, at 5.

matter down for an evidentiary hearing, and determine which parties are granted party status for the hearing.[17]

If it is determined that no triable issues of fact requiring adjudication are presented, legal issues raised by the parties whose resolution is not dependent on facts that are in substantial dispute are reviewed. Legal determinations made by ORES staff as reflected in the draft siting permit are examined for an error of law.[18] Exercises of discretion and policy decisions made by ORES staff are reviewed for an abuse of discretion.[19]

With respect to factual disputes between an applicant and ORES staff, an issue is adjudicable if it relates to a substantive and significant dispute over a proposed term or condition of the draft siting permit, including the USCs, or relates to a matter cited by ORES staff as a basis to deny the siting permit and is contested by the applicant.[20]

With respect to a factual issue sought to be raised by a potential party, the issue is adjudicable if it is both

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[17] See 19 NYCRR 900-8.3(b)(5)(i), (ii).

[18] See Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 5-6 (citing Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d 398, 404-405 [1979]).

[19] See Cider Solar, Decision at 8; Heritage Wind, Interim Decision at 6 (citing Matter of Peckham v Calogero, 12 NY3d 424, 430-431 [2009]; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

[20] See 19 NYCRR 900-8.3(c)(1)(i), (iii).

substantive and significant.[21] An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry.[22] An issue is significant if it has the potential to result in the denial of a siting permit, a major modification to the proposed project, or the imposition of significant siting permit conditions in addition to those proposed in the draft siting permit, including uniform standards and conditions.[23]

To participate as a party in any adjudication under 19 NYCRR subpart 900-8, the potential party seeking full party status must file a petition in writing that, among other things, identifies an issue for adjudication that meets the criteria of 19 NYCRR 900-8.3(c), and presents an offer of proof specifying the party's witnesses, the nature of the evidence the person expects to present, and grounds upon which the assertion is made with respect to that issue.[24] In situations such as here, where ORES staff has reviewed an application and finds that the applicant's project, as proposed or as conditioned by the draft siting permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing to litigate any issue to demonstrate that it is both substantive and

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[21] See 19 NYCRR 900-8.3(c)(1)(iv).

[22] See 19 NYCRR 900-8.3(c)(2).

[23] See 19 NYCRR 900-8.3(c)(3).

[24] See 19 NYCRR 900-8.4(c)(2)(ii).

significant.[25] To raise a fact issue for adjudication, a potential party must allege facts that are either (i) contrary to what is in the application materials or draft siting permit, (ii) demonstrate an omission in the application or draft siting permit, or (iii) show that defective information was used in the application or draft siting permit.[26]

As noted above, a potential party carries its burden of persuasion through an offer of proof by a qualified expert.[27] In determining whether a potential party has demonstrated an issue is substantive and significant, the party's offer of proof is evaluated in light of the application and related documents, the standards and conditions, or siting permit, the content of any petitions for party status, the record of the issues determination procedure, and any subsequent written or oral arguments authorized by the ALJ.[28] Any assertions a potential party makes in its offer of proof must have a factual or scientific foundation. Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. Moreover, the qualifications of the expert witness that a

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[25] See 19 NYCRR 900-8.3(c)(4); Cider Solar, Decision at 27-28. A potential party's burden of persuasion at the issues determination stage of the proceeding is only temporary. If a potential party's issue is joined for adjudication, the burden of proof shifts back to the applicant, who bears the ultimate burden of proof at the hearing. See 19 NYCRR 900-8.8(b)(1).

[26] See Cider Solar, Decision at 10.

[27] See 19 NYCRR 900-8.4(c)(2)(ii).

[28] See 19 NYCRR 900-8.3(c)(2).

potential party identifies may also be examined at this stage, including the proposed expert's background and expertise with respect to the specific issue area concerned. Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft siting permit and proposed conditions, staff's analysis, or the record of the issues determination procedure, among other relevant materials and submissions. In the areas of staff's expertise, its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue.[29]

Finally, in addition to issues raised by an applicant or other potential party, public comments, including comments provided by a municipality, on a draft siting permit condition published by the Office may also identify an adjudicable issue provided those comments meet the substantive and significant standard for adjudication.[30]

V. DISCUSSION

1. Applicant's Statement of Issues and Requests for Clarification

As noted above, applicant timely filed a statement of issues. Applicant stated its acceptance of the conditions of the

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[29] See Cider Solar, Decision at 11; Heritage Wind, Interim Decision at 8-9 (citing Matter of Roseton Generating LLC, Decision of the Commissioner, March 29, 2019, at 11-12 [NYSDEC]); see also Matter of Crossroads Ventures LLC, Interim Decision of the Deputy Commissioner, Dec. 29, 2006, at 5-10 (NYSDEC).

[30] See 19 NYCRR 900-8.3(c)(1)(ii).

draft permit but requested clarification from ORES regarding two SSCs, specifically (1) to allow a phased notice to proceed approach to construction and (2) to address wetland mitigation for the 0.02 acres of State-regulated projected wetland impacts resulting from this project.[31]

a. Phased Notice to Proceed

Applicant requested Office staff consider adding a phased notice to proceed approach to construction as a SSC of the draft permit "to ensure that seasonal clearing and construction restrictions can be adhered to during the compliance and construction phases." Applicant points to the identical SSC granted in Matter of Homer Solar Energy Center LLC and, "with the support of ORES staff," requests that it be added to this permit. It reads as follows:

> Phased Notice to Proceed — Consistent with 19 NYCRR § 900-10.2, and in addition to the Notice to Proceed (NTP) authorization in 19 NYCRR § 900-6.1(g), the Permittee may request a conditional NTP for a specific construction activity or specific phase of construction. For each such requested activity or phase, the Permittee shall have submitted to the Office a scope of work and all applicable pre-construction compliance filings listed in 19 NYCRR § 900-10.2 or this Draft Permit and identified by the Office as a condition to NTP approval.[32]

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[31] See applicant issues statement.

[32] See applicant issues statement at 3-4; ORES DMM Matter No. 21-00976, Matter of Homer Solar Energy Center, LLC, DMM Item No. 54, ORES staff substantive and significant issues brief at 130.

Applicant requests that ORES staff consider adding the SSC to the permit because major renewable energy facilities are often constructed in phases and each phase "frequently includes a contractor who specializes in the specific design and construction occurring for that phase." Applicant also stated that "(n)ot every phase of construction requires full Facility design and instead construction activities can commence while other portions of facility design are being finalized."[33]

In Matter of ConnectGen Chautauqua County, LLC (South Ripley Solar),[34] the ALJs included the same phased notice to proceed as a SSC in the draft permit. In doing so, the ALJs recognized that such an SSC would ensure applicant complies with the schedule for the project. The same rationale applies here. In addition, the ALJs in that case noted applicant's reference to include the same SSC in the Matter of Horseshoe Solar Energy LLC draft siting permit and as adopted by stipulation in the Matter of Greens Corners Solar LLC siting permit proceeding.[35]

In response, Office staff stated that it "has no objection to resolving this issue by stipulation of the parties."

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[33] See applicant issues statement at 3-4.

[34] See ORES DMM Matter No. 21-00750, Matter of ConnectGen Chautauqua County, LLC (South Ripley Solar), Ruling of the Administrative Law Judges on Issues and Party Status, Oct. 12, 2022, at 13.

[35] See applicant issues statement at 3-4; South Ripley Solar, Issues Ruling at 12-13; ORES DMM Matter No. 21-02480, Matter of Horseshoe Solar Energy LLC, DMM Item No. 32, draft siting permit at 70-71; ORES DMM Matter No. 21-00982, Matter of Greens Corners Solar LLC, DMM Item No. 57, executed stipulation at 1.

In a stipulation filed on November 28, 2022, ORES staff and applicant agreed that applicant "may request a conditional NTP for a specific construction activity or specific phase of construction." The parties also agreed for the Office to add the above SSC to the final permit.[36] As noted by ORES staff, including this SSC is consistent with Office precedent involving the draft siting permits in Horseshoe Solar and Hemlock Ridge Solar LLC.[37]

Ruling: The issue of including a SSC in the final permit to provide for a phased notice to proceed approach to construction having been resolved by stipulation, no adjudication is required. The draft siting permit should be modified to include the phased notice to proceed condition agreed to by applicant and ORES staff.

b. Wetland Mitigation

Applicant proposes the following new SSC to address wetland mitigation:

> Pursuant to 19 NYCRR §§ 900-2.15(g) and 900-10.2(f)(2), the Permittee is required, to the extent that impacts cannot be avoided, to submit a Wetland Restoration and Mitigation Plan which shall mitigate 0.02 acres of impacts to state-regulated wetlands at a 1:1 mitigation ratio by area of impact (restoration or enhancement).[38]

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[36] See Greens Corners Solar, executed stipulation at 1.

[37] See ORES staff substantive and significant issues brief at 90.

[38] Applicant issues statement at 4.

According to applicant, the additional findings in the draft permit at section 4(c) denied "the needed mitigation through purchase of mitigation bank credits from Ducks Unlimited, and directed the permittee to provide a final Wetland Restoration and Mitigation Plan to ORES, but did not include any SSC related to this item."[39] ORES staff claim an additional SSC is not required because "there is no disagreement on the acreage of impact and the mitigation ratio will be consistent with 19 NYCRR §§ 900-2.15(g)." ORES staff also state that it clarified in the "Additional Findings at subpart 4(c) of the Draft Permit that the previously proposed SSC related to a consideration of the purchase of mitigation bank credit(s) did not meet the requirements in 19 NYCRR § 900-2.14(g)(1)." ORES staff further note that a Final Wetland Restoration and Mitigation Plan would be required in compliance with 19 NYCRR 900-10.1(a) and 900-10.2(f)(2).[40]

According to ORES staff, "(i)n response to the Applicant's request to exclude wetland creation as a form of mitigation, the Office respectfully clarifies that neither 19 NYCRR 2.15(g)(2)(iv) nor the Additional Findings at subpart 4(c) of the Draft Permit require creation." ORES staff contend that "creation is an option that the Applicant may (or may not) choose to pursue." ORES staff further state that applicant "may elect to pursue restoration to enhancement as adequate mitigation at its

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[39] Applicant issues statement at 4.

[40] ORES staff substantive and significant issues brief at 91.

discretion."[41]

We note that 19 NYCRR 900-2.15(g)(2)(iv) provides for "creation, enhancement and restoration" and ORES staff never mentions that the SSC with these terms should not be applied. Applicant points out that the SSC for wetland mitigation it proposes in this case is similar to the condition adopted in the draft permit in Homer Solar, to submit a wetland restoration and mitigation plan "which shall mitigate 0.33 acres of impacts to Unmapped Wetlands (W2-17) at a 1:1 mitigation ratio by area of impact (creation, restoration and enhancement)."[42] Likewise, a SSC should be required in this case to address wetland mitigation for the 0.02 acres of State-regulated wetland impacts that are expected and cannot be avoided.

We conclude that applicant does not state a substantive and significant issue requiring adjudication. We agree with ORES staff that there is no dispute as to the acreage anticipated to be impacted and that the mitigation ratio will be consistent with 19 NYCRR 900-2.15(g). We also agree with ORES staff that questions regarding wetland mitigation "can be addressed in accordance with the requirements of 19 NYCRR 900-2.15(g), 900.6.4(q)(2), 900-10.1(a) and 900-10.2(f)(2), at or before the pre-construction compliance filing stage."[43]

Ruling: Applicant's request for modification of the

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[41] ORES staff's substantive and significant issues brief at 91.

[42] See ORES DMM Matter No. 21-00976, Matter of Homer Solar Energy Center, LLC, DMM Item No. 39, draft siting permit at 71; applicant issues statement at 3.

[43] ORES staff substantive and significant issues brief at 91.

draft permit to include a SSC for wetland mitigation does not meet the standards for adjudication. The Draft Permit should be modified to include an additional SSC for wetlands related to wetland mitigation that provides for "creation, enhancement, and restoration," as indicated above.

2. Town of Clayton's Procedural Objections

The Town of Clayton raises procedural objections regarding the appropriateness of ORES staff's local law waiver determinations and recommendations. The Town claims, among the above proposed issues, that ORES staff improperly determined waiver of multiple provisions of its local zoning law without identifying supporting facts or analysis, in violation of Executive Law § 94-c, 19 NYCRR 900-2.25(c), and State Administrative Procedure Act (SAPA) § 307. Likewise, the Town asserts that applicant "relies on a series of conclusory statements" with "no specific showings, using facts and analysis, as required by 19 NYCRR 900-2.25(c)(1), (2), or (3)." The Town alleges that based on these failures, ORES abused its discretion and committed an error of law in "recommending waiver of Clayton's laws for reasons outside the narrow standard for waiver set forth in statute and regulation." The Town also asserts that ORES staff operates "as if the Draft Permit creates an irrebuttable presumption that waiver recommendations in the Draft Permit are valid."[44]

[44] See Town of Clayton petition at 13-14, 25.

Pursuant to 19 NYCRR 900-2.25, the applicant has the burden of identifying all substantive local ordinances, laws, resolutions, regulations, standards, and other requirements applicable to the construction or operation of a major renewable energy facility, and those substantive local law requirements the applicant requests the Office elect not to apply to the facility. For those local law requirements for which the applicant seeks a waiver from ORES, the applicant must provide a statement of justification showing with facts and analysis the degree of burden caused by the requirement, why the burden should not reasonably be borne by the applicant, that the request cannot reasonably be obviated by design changes to the facility, that the request is the minimum necessary, and that the adverse impacts of granting the request would be minimized or mitigated to the maximum extent practicable consistent with applicable requirements set forth in 19 NYCRR part 900 (Part 900). For waiver requests that are grounded in existing technology, the applicant must also demonstrate that there are technological limitations that make compliance technically impossible, impractical, or otherwise unreasonable. For requests grounded in costs or economics, the applicant must further demonstrate that the costs to consumers associated with applying the local law outweigh the benefits of applying the law. For requests grounded in the needs of the consumers, the applicant must also demonstrate that the need for the facility outweighs the impacts on the community that would likely result from not applying the local law provision.[45]

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[45] See 19 NYCRR 900-2.25(a), (c).

In this case, applicant included a request for a waiver of the Town of Clayton's local laws in its application exhibit 24. Exhibit 24 provides information on the factors that are expressly relevant to a waiver determination under Executive Law § 94-c and 19 NYCRR 900-2.25, including factors related to existing technology, costs or economics, and the needs of consumers if applicable.[46] ORES staff reviewed the application and proposed in section 4(a) of the draft siting permit to waive, in whole or in part, four provisions (§§ 235-9.1(E)(1)(b) - setbacks, 9.1(E)(1)(h) - noise, 9.1(E)(1)(i) – access roads, and 9.1(G) – decommissioning) of the Zoning Law of the Town of Clayton (Local Law No. 2 of 2019) (Town Zoning Law) it concluded are unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility, and included its findings in subpart 4 of the draft siting permit. ORES staff denied applicant's request for partial relief from § 235-9.1(E)(1)(e) (visual screening) on the grounds that the proposed screening failed to comply with the town code requiring landscape screening to public roads and 19 NYCRR 900-2.9 to avoid, minimize, and mitigate potential significant adverse impacts. ORES staff recommended SSC 6(c) to require a final visual impacts minimization and mitigation plan.

As discussed further below, we conclude that upon reviewing the objections raised by the Town of Clayton in its petition to the proposed local waivers, the Town failed to raise any substantive and significant issues requiring adjudication.

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[46] See DMM Item No. 32, application exhibit 24: Local Laws and Ordinances rev 2, at 24-4 to 24-10.

ORES staff appropriately granted waivers, taking into consideration the interests of applicant and the Town by approving the minimum relief required to ensure protection of the environment and achievement of the CLCPA targets.

The Town's procedural objections regarding ORES staff's waiver recommendations are rejected on the grounds that they lack merit. First, with respect to ORES staff's justification for its proposed local law waiver determinations, the Town claims that ORES staff improperly determined waiver of multiple provisions of its local zoning law without identifying supporting facts or analysis, in violation of Executive Law § 94-c, SAPA § 307, and Part 900. The Town of Clayton also claims the applicant "makes no specific showings, using facts and analysis" as required by Part 900 and "relies on a series of conclusory statements."[47]

A detailed explanation of ORES staff's proposed waiver determination, however, is not required in the draft siting permit so long as the waiver is supported by the record.[48] Here, applicant detailed its waiver requests and justifications in application exhibit 24. As discussed further below, staff may rely on application documents that support ORES staff's proposed waiver determinations without providing any additional explanation in the draft permit. ORES staff also explained its waiver recommendations in the draft siting permit and in its substantive and significant issues brief. The Town neither explains why the

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[47] See Town of Clayton petition at 13.

[48] See ORES DMM Matter No. 21-02480, Matter of Horseshoe Solar Energy LLC, Ruling of the Administrative Law Judges on Issues and Party Status, and Order of Disposition, June 13, 2022, at 53.

extensive information provided in applicant's application exhibit 24 and its appendices are inadequate nor identifies the information that is missing, as applicant notes.[49]

The Town incorrectly relies on SAPA § 307 to support its claim that ORES staff improperly recommended waiver of local laws "without facts or analysis." SAPA § 307 is not applicable at this stage of the proceeding involving proposed waivers in the draft siting permit, which are non-final agency determinations. SAPA § 307 specifically applies to an agency's "final decision, determination or order." An example of a final decision is a decision of the Executive Director. Notwithstanding this rule, ORES staff points out that the basis for the Office's waiver recommendations are fully explained through its procedures, which include a substantive and significant issues brief, public comment hearing and 60-day public comment period and, where applicable, an adjudicatory hearing.[50]

Contrary to the Town's "irrebuttable presumption" argument, the issuance of a draft siting permit does not create any presumption regarding the validity of waiver recommendations in the draft permit.[51] The purpose of issuing the draft permit during the issues determination stage is to receive comments on the draft siting permit and to determine whether adjudication is required to address any formal factual objections by the applicant, affected local governments, or other intervenors to the

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[49] See applicant response at 14.

[50] See ORES staff substantive and significant issues brief at 30; 19 NYCRR 900-8.3(a) and (b).

[51] See Town of Clayton petition at 25.

terms and conditions proposed by ORES staff in the draft permit. ORES staff correctly describes this process as the "first step in the required public notification of Staff's recommendations," which is followed by the opportunity to comment "through multiple channels" within a period of 60 days and by petitioning the assigned ALJs "for an adjudicatory hearing on potential substantive and significant issues."[52]

The Town's "irrebuttable presumption" argument also includes a claim that such a presumption "violates Home Rule and removes local input from the process of considering local issues." This is incorrect. Courts have rejected home rule challenges to the discretionary authority granted by the Legislature to State agencies to preempt local laws in the context of electric generation siting, as applicant notes.[53] According to the Home Rule provision of article IX of the New York State Constitution, "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property,

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[52] See ORES staff substantive and significant issues brief at 28-30.

[53] See Town of Clayton petition at 25; applicant response at 9; Town of Copake v New York State Office of Renewable Energy Siting, Sup Ct, Albany County, October 21, 2021, Lynch, P., index No. 905502/21, appeal pending; Consolidated Edison Co. of N.Y. v Town of Red Hook, 60 NY3d 99, 107-108 (1983); County of Orange v Public Serv. Commn. of the State of N.Y., 39 AD2d 311, 317 (2d Dept), affd without opn 31 NY2d 843 (1972); Matter of Citizens for Hudson Val. v New York State Bd. on Elec. Generation Siting & Envt., 281 AD2d 89, 95-96 (3d Dept 2001).

affairs or government."[54] New York State Supreme Court in a recent decision in Town of Copake v New York State Office of Renewable Energy Siting observed that Executive Law § 94-c(5)(e) "is a general law applicable to all municipalities." [55] As stated by applicant in this case, municipalities are authorized to implement and enforce only those local laws that are consistent with New York State general laws like the CLCPA and Executive Law § 94-c.[56]

Executive Law § 94-c(5)(e) states:

> A final siting permit may only be issued if the office makes a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions would comply with applicable laws and regulations. In making this determination, the office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes the finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.

To the extent that a local law is inconsistent with the CLCPA, the plain language of Executive Law § 94-c(5)(e) authorizes ORES to exercise discretion as to its application. Indeed, this discretionary authority is consistent with the Legislature's purpose stated in Executive Law § 94-c(1) — for ORES to "undertake a coordinated and timely review of proposed major renewable energy

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54 N.Y. Const., art. IX, § 2(c)(ii).

55 See Town of Copake at 13.

56 See applicant response at 9.

facilities to meet the state's renewable energy goals while ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors."[57]

In the context of its "Home Rule" argument, the Town asserts that "ORES' refusal to create a record of evidence in support of the full application of local law also violates its statutory mandate to review all pertinent social, economic, and environmental considerations before issuing a final permit." This argument is unpersuasive because it implies an evidentiary hearing should be held for every challenge to waiver of local laws when Executive Law § 94-c(5)(d) specifically provides for an adjudicatory hearing only upon the raising of a substantive and significant issue. Applicant relies on Executive Law § 94-c(5)(d) to correctly conclude that ORES cannot hold a hearing "(i)f Clayton cannot meet this prerequisite requirement of establishing a substantive or significant issue for adjudication."[58]

The Town's argument that ORES staff exceeded its delegated powers to waive local laws without regard to statutory and regulatory standards is also without merit.[59] When an applicant seeks a waiver of substantive local law requirements, it has the burden of demonstrating that compliance with the local requirement is unreasonably burdensome in light of the CLCPA targets and the environmental benefits of the facility. To support the waiver request, the applicant must provide the statement of justification required by 19 NYCRR 900-2.25(c). If

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[57] See Executive Law § 94-c(1).

[58] See applicant response at 11.

[59] See Town of Clayton petition at 12.

staff determines, based on its review of the application materials and the justification provided by applicant, that applicant has supported its request with sufficient facts and analysis, staff has the discretion not to apply, in whole or part, those substantive local law provisions that it concludes are unreasonably burdensome in view of the CLCPA targets and the environment benefits of the proposed facility. In doing so, Office staff acts well within its statutory and regulatory authorities.[60]

The Town's claim that ORES violates the requirement to take "a hard look at numerous adverse impacts" when it "refuses to solicit input from a local government prior to recommending wavier of local law" is erroneous. In claiming that ORES's issuance of a draft siting permit created an "irrebuttable presumption that waiver recommendations in the Draft Permit are valid," the Town ignores the fact that ORES staff's determination regarding waiver of local laws is merely a recommendation — not a final decision. ORES staff did not refuse to "create a record of evidence in support of the full application of local law" in violation of its "statutory mandate to review all pertinent social, economic, and environmental considerations before issuing a final permit," as the Town claims.[61] To the contrary, the record demonstrates ORES staff's consideration of the detailed exhibits and public input provided in this proceeding, none of which the Town refutes.

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[60] See Executive Law § 94-c(5)(e); 19 NYCRR 900-2.25(c).

[61] See Town of Clayton petition at 25.

3. Town of Clayton's Substantive Objections

a. Proposed issue of non-compliance with Clayton Zoning Law § 259-9.1(E)(1)(b) regarding setbacks

Town Code § 235-9.1(E)(1)(b) states:

> Large-scale solar energy systems shall adhere to the setback requirements of the underlying zoning district. In addition, a minimum fifty-foot setback shall be maintained between any adjoining residence property line, unless a solar easement is awarded from the respective property owner and a large-scale solar energy system. [Setbacks for the Agricultural and Rural Residential Zoning District include 50 feet from front and rear lot lines, 25 feet from side lot lines, and 50 feet from any lot line of any residential property].[62]

The Town of Clayton relies on its offer of proof from Robert J. Campany, PE, president of Saint Lawrence Engineering DPC, to disagree with applicant's position that there are technological, economic, or environmental factors that make compliance with this local law unreasonably burdensome. In Mr. Campany's view, compliance with this local law "would not impair any proposed environmental benefits of the facility." Mr. Campany asserts that reconfiguration of the pv panel layout would maintain property line setbacks between internal adjacent property owners. He points to other areas "within the development," including developable property "along the northern and southern border of parcel 52.00-1-21.1 that would allow additional modules to be installed" and unused land area "to the west of the current array configuration for parcel 42.00-2-26.2 owned by PENSCO Trust

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[62] See draft siting permit at 5-6, citing Town of Clayton Code § 235-9.1, Solar Energy Systems, 2019.

Company LLC" that consists of nine acres of open fields. Regarding the existing wetlands in this area, Mr. Campany contends that "pile supported arrays" in such areas are generally acceptable by the NYSDEC and ACOE under these circumstances.[63] The Town of Clayton also relies on its offer of proof from Ken J. Knapp, Town of Clayton Deputy Town Supervisor, to support its claim that this local law is "reasonable," the result of "a lengthy legislative process," and consistent with "local land use and development plans." Mr. Knapp believes that waiving this local law would "directly harm surrounding property owners' rights, values and their inherent development rights."[64]

In its statement of justification to satisfy its burden of proof under Executive Law § 94-c(5)(e) and 19 NYCRR 900-2.25(c), applicant describes the degree of burden caused by this local law. Applicant notes that applying the setback provision to participating, internal lot lines would require it to "eliminate PV modules from a 50-foot to 100-foot corridor wherever the Facility Site was divided by internal tax parcel boundaries — even where two tax parcels are owned by the same individual." To do so, applicant explained, would result in a loss of approximately 1.02 MW of generating capacity due to losing about 0.49 acres of pv area — and wasted 100-foot strips of land between the participating parcels. Applicant notes that landowners leasing their land for this project would be denied use of that land "for no clear purpose." Applicant further notes that "numerous 100-foot strings of panels, including one array segment bisected by

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[63] See DMM Item No. 46, Campany affidavit at 5-6.

[64] See DMM Item No. 46, Knapp affidavit at 9.

the setback" would be eliminated, resulting in the loss of 2.82 acres of buildable area.[65]

Regarding why the burden cannot reasonably be borne by applicant, applicant points out that the setback only impacts participating landowners who have already consented to the project. On the other hand, adhering to the setback requirement would likely spread out the project and increase impacts to nonparticipating lot lines — the facility already adheres to lot line setbacks for nonparticipating lot lines that are twice those required in the Town of Clayton. As such, applicant claims the request is the minimum necessary "because it only impacts participating landowners who have already consented to having Facility components located on their properties — up to and across their boundary lines." Accordingly, and as pointed out by ORES staff, adverse impacts that potentially could result from waiving the setback requirement are "avoided, minimized, and mitigated to the maximum extent practicable."[66]

With respect to whether design changes are feasible, applicant explained that relocating panels elsewhere in the project area is likely to increase impacts. First, the land is surrounded by several wetlands. Second, increasing the project layout to accommodate the shifts needed to apply this setback may involve relocating lost panel strings to other areas, which could

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[65] See application exhibit 24 rev 2, at 24-5 and 24-6.

[66] See ORES staff substantive and significant issues brief at 40; application exhibit 24 rev 2, at 24-6 and 24-7.

potentially increase visual and noise impacts to the detriment of landowners and the community.[67]

In the draft siting permit, ORES staff recommends a partial waiver of this local law. ORES staff notes applicant's request was limited to the applicability of the local law to internal lot lines between participating parcels. Accordingly, the draft permit grants partial relief for internal lot lines between participating parcels within the facility site. ORES staff further clarifies that setbacks at 19 NYCRR 900-2.6(d) and Table 2 apply.[68] In granting limited relief to the setback requirement, ORES staff points out that the request was limited to solar panels proposed in three remote areas: two areas within the 50-foot side setback between participating parcels 42.00-2-26.1 and 42.00-2-26.2 (0.34 acres) and one area within the 50-foot side setback between participating parcels 42.00-2-26.2 and 52.00-1-21.1 (0.15 acres). ORES staff also notes the significant distance between these areas and the closest non-participating residences on Wilder Road in the Town of Orleans, specifically two arrays located across and adjacent to the property line 42.00-2-26.1 (Larose) and 42.00-2-26.2 (Pensco Trust Company LLC) were sited approximately 720 feet away and arrays located adjacent to the property line between 42.00-2-26.2 (Pensco Trust Company LLC) and 52.00-1-21.1 (Wall Haven Farms) were sited about 470 feet away.[69]

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[67] See application exhibit 24 rev 2, at 24-6.

[68] See draft siting permit at 5-6; DMM Item No. 26, application exhibit 24 revised, appendix 24-C.

[69] See ORES staff substantive and significant issues brief at 41; application exhibit 24 revised, appendix 24-C, figure 24-2 and 24-3.

ORES staff concludes that granting this limited relief for areas along internal lot lines between participating parcels, allowing for arrays across, or adjacent to, participating lot lines would not cause increased visual or noise impacts to non-participating residences. The draft permit requires the facility to comply with the screening requirements set forth in Town of Clayton Town Code 9.1(E)(1)(e).[70] Also, a SSC requires applicant to prepare and submit to ORES for approval as a mandatory pre-construction compliance filing a final visual impact minimization and mitigation plan that includes a revised screen planting plan in compliance with this town code.[71]

The Town's claim that the arrays can be reconfigured "to allow for maintaining property line setbacks between adjacent property owners" is unpersuasive. Applicant argues that applying the setback "would result in the creation of 100-foot wasted strips of land between participating parcels included in the Facility Site" — a claim not addressed by the Town. Applicant correctly notes that the Town's argument directly contradicts its own solar law, which provides for "a minimum fifty-foot setback between any adjoining residence property line, unless a solar easement is awarded from the respective property owner and a large-scale solar energy system."[72] The Town does not acknowledge that these same circumstances exist in this case.

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70 See draft siting permit at 9.

71 See 19 NYCRR 900-10.2; draft siting permit at 64; ORES staff's substantive and significant issues brief at 41-42.

72 See applicant response at 19; Town of Clayton petition at 17-18.

Mr. Knapp concludes that waiver of the setback provision would "directly harm surrounding property owners' rights, values and their inherent development rights, harm the integrity thus calling into question, the substantive portions of Local Zoning Law, and all the underlying Zoning Districts regulatory status and standards," yet the record is devoid of any factual bases to support these claims. The Town disagrees with waiving the setback provision but neither explains any impacts or burdens that would result from waiving it nor why having empty strips between adjacent fields of panels is beneficial if it were enforced. ORES staff note that the ALJs in Hemlock Ridge considered similar relief from setbacks applicable to participating internal lot lines and determined that the town's "disagreement with ORES staff's recommendation to waive local laws is insufficient to raise a substantive and significant issue for adjudication."[73]

With respect to Mr. Campany's reference to "unused land area to the west of the current array configuration for parcel 42.00-2-26.2 owned by PENSCO Trust Company LLC" to accommodate arrays, applicant correctly describes this area as "designated wetlands." According to applicant, these areas "are unused for panel locations in order to avoid impacts to those wetlands." Indeed, revised figure 14-1 clearly depicts these areas to the west of the current array as wetlands, which are shown on appendix

[73] See ORES DMM Matter No. 21-00748, Matter of Hemlock Ridge Solar LLC, Rulings of the Administrative Law Judges on Issues and Party Status, and Order of Disposition, Aug. 19, 2022, at 13; ORES staff substantive and significant issues brief at 42; Knapp affidavit at 9.

5-A as wetlands W5-001A and W5-001B and adjacent areas.[74] Mr. Campany also claims that "developable property exists along the northern and southern border of parcel 52.00-1-21.1 that would allow additional modules to be installed" — but applicant correctly identifies these areas as designated for the placement of vegetative filter strips to control stormwater.[75] As pointed out by ORES staff, prior cases consistently show ORES staff's avoidance of compliance with internal setbacks that would require the development of additional lands and increase potential significant adverse impacts in the community.[76]

On March 9, 2021, ORES staff, in consultation with NYSDEC, issued a wetlands jurisdictional determination, listing State-regulated wetlands within the facility site and surrounding 100-foot area, as required by 19 NYCRR 900-2.15(a). Identified were ten wetlands "assumed to be federal wetlands." The following State regulated wetlands were also identified: W4-004 and W4-032 within 500 feet of mapped state-regulated wetlands, W4-018, W4-020, W4-025, W5-001, and W5-037 that exceed the 12.4 threshold for State jurisdiction, and two that are State-regulated based on

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[74] See DMM Item No. 26, application exhibit 14: Wetlands rev 1; DMM Item No. 32, application exhibit 14: Wetlands rev 2; applicant response at 19-20.

[75] See Campany affidavit at 6; Town of Clayton petition at 17; applicant response at 20; application exhibit 24 rev 2.

[76] See ORES staff substantive and significant issues brief at 40-41; ORES DMM Matter No. 21-00748, Matter of Hemlock Ridge Solar LLC, DMM Item No. 38, draft siting permit at 6, 9-10; Horseshoe Solar, draft siting permit at 10-12; Homer Solar, draft siting permit at 6-7, 9-10, and 13-14; ORES DMM Matter 21-00750, Matter of ConnectGen Chautauqua County LLC (South Ripley Solar), DMM Item No. 68, draft siting permit at 7.

their hydrologic connection to other State-regulated wetlands (W5-004 and W5-041). On December 2, 2021, ORES staff issued a revised wetlands jurisdictional determination that included the addition of portions of the following features: RS-W8-016, W5-009, W6-005, and W8-016.[77]

Applicant confirmed that when avoiding impacts to wetlands was not possible, to minimize permanent impacts, "the narrowest, non-forested portions of the wetlands" were chosen to "cross locations of collection lines and access roads." In accordance with 19 NYCRR 900-6.4(q)(2), applicant also confirmed it will restore "temporary impacts to NYS-regulated wetlands and adjacent areas." Applicant minimized impacts to the State-regulated wetlands by "routing collection lines around wetland boundaries and their 100-foot adjacent areas where practicable and crossing underneath a forested wetland (W4-032) using HDD to avoid impacts." Applicant also applied several other minimizing measures to avoid wetland impacts.[78]

Mr. Campany incorrectly claims that "pile supported arrays are generally allowed by the NYS DEC and ACOE to be constructed in these situations."[79] Irrespective of what NYSDEC or ACOE under federal law allow, 19 NYCRR 900-2.15, exhibit 14: Wetlands, specifically identifies permissible activities and clarifies whether mitigation is required. Section 900-2.15(a) requires an applicant to delineate "all federal, state and locally

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[77] See application exhibit 14 rev 1, at 14-1.

[78] See application exhibit 14 rev 2, at 14-18 to 14-19.

[79] See Campany affidavit at 6; ORES staff substantive and significant issues brief at 45.

regulated wetlands and adjacent areas present on the facility site and within one hundred (100) feet of areas to be disturbed by construction." If unable to avoid impacts, applicant must explain efforts made to "minimize the impacts to wetlands and adjacent areas identified during wetland surveys."[80] If compensatory mitigation is required in "Table 1 Wetland Mitigation Requirements," unless a different decision is made by the Office in consultation with NYSDEC, applicant shall submit a Wetland Restoration and Mitigation Plan.[81] Table 1 — and not the NYSDEC or ACOE — specifies the extent to which an activity is allowed.

We conclude that adverse impacts to the State's environmental resources have been minimized or avoided to the maximum extent practicable. We further conclude that the record supports ORES staff's limited waiver determination. Any likely waivers of setback requirements set forth in local laws under Executive Law § 94-c and Part 900 are analyzed in each case applying the factors stated in 19 NYCRR 900-2.25(c).[82] In this case, applicant's waiver request was limited to internal lot lines between participating parcels within the facility site. ORES staff notes that applying the setback is consistent with Executive Law § 94-c. The record also fails to establish unmitigated adverse impacts associated with granting the limited waiver request and imposing the setbacks provided for in condition 4(a) of the draft siting permit that are limited to internal lot lines in two areas between participating parcels within the Town of

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80 19 NYCRR 900-2.15(f).

81 19 NYCRR 900-2.15(g) and 900-10.2(f)(2).

82 See South Ripley Solar, Issues Ruling at 35.

Clayton. Applicant has established that the request is the minimum relief necessary.[83]

Ruling: Proposed issue of non-compliance with Clayton zoning law regarding setbacks does not meet the standards for adjudication.

b. Proposed issue of non-compliance with Clayton zoning law § 259-9.1(E)(1)(h) regarding noise

Town Code § 235-9.1(E)(1)(h) states:

> Noise-producing equipment such as substations and inverters shall be located to minimize noise impacts on adjacent properties. Their setback from property lines should achieve no discernable difference from existing noise levels at the property line.[84]

The Town of Clayton relies on its offer of proof from Mr. Knapp to oppose the waiver of the provision of the second part of the local law that noise-producing equipment such as substations and inverters "should achieve no discernable difference from existing noise levels at the property line." According to Mr. Knapp, the local law is "intended to provide a reasonable standard to satisfy the specific guidance in the following JCP Sections: Section 9, sub-sec: Renewable Energy/Solar regulations considerations, Section 12, Impacts and Considerations for (all) heavy industrial/large commercial development, Heavy Industrial Large Commercial and Renewable

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[83] See draft siting permit at 5-6; application exhibit 24 rev 1, figures 24-2 and 24-3.

[84] See draft siting permit at 6, citing Town of Clayton Code §235-9.1, Solar Energy Systems, 2019.

Energy Development Summary."[85] Mr. Knapp also claims:

> (t)o waive the Section 9.1(E)(1)(h) requirements would harm the adjoining [sic] property [sic] owners' vested property rights and regulatory/Zoning expectations, add potential health risks, undermine the authority and duties of the Town of Clayton [sic] to protect [sic] citizens' health, safety and property rights, as well, it would call into question the overall integrity of all the Zoning [sic] Districts' regulatory status and standards, which in turn all emanate from the JCP, LWRP and CRCWRA. The repercussions to the Zoning Law will not be limited to the Solar Law Section if waiver of this provision is granted.[86]

In its statement of justification to satisfy its burden of proof under Executive Law § 94-c(5)(e) and 19 NYCRR 900-2.25(c), applicant claims a waiver is necessary for that portion of the provision that requires "no discernable difference from existing noise levels at the property line" on the grounds that it presents technological challenges. Applicant explains that noise monitoring at several discrete locations along non-participating property boundaries between the facility site and non-participating abutting properties is unreasonably burdensome considering the CLCPA targets and the environmental benefits of the proposed facility.[87]

With respect to the degree of burden caused by complying with this provision, applicant objects to enforcement of a "no

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85 See Town of Clayton petition at 18.

86 See Knapp affidavit at 11.

87 See application exhibit 24 rev 2, at 24-7 to 24-8.

discernable difference" standard because it is "entirely subjective." Mr. Knapp claims the local law is "intended to provide a reasonable standard," but applicant contends the standard is subjective and therefore "impossible" to design for, measure, and enforce. We agree. The local law fails to define "discernable noise" or provide any direction on how to implement and abide by such a standard. To this point, applicant argues that "even the question of compliance is undefined." We agree with applicant that the noise standard based on discernability as stated in the local law is undefined and therefore exceedingly difficult to enforce. Applicant's point that each person interprets discerning sound differently, depending on hearing quality and location and time on or near the property boundary, is credited.

Regarding why the burden cannot reasonably be borne by applicant, applicant explains that such monitoring would require "in essence, 24/7 noise monitoring at hundreds or thousands of discrete locations along these property boundaries between the Facility Site and all non-participating abutting lands." Contrary to Mr. Knapp's claim that compliance with the local law would result in minimal negative impacts to the developer, applicant asserts it would be burdened with logistical complexities and additional considerable costs beyond what it describes as an "already expensive" project to monitor compliance.[88]

With respect to whether design changes are feasible, applicant discussed that it is already complying with Town requirements to "avoid noise impacts" in accordance with the noise

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[88] Application exhibit 24 rev 2, at 24-7 to 24-8.

standards stated in 19 NYCRR 900-2.8(b)(2).[89] Under 19 NYCRR 900-2.8(b)(2), the maximum exterior noise limits are 45 dBA during a period of eight hours at the outside of any existing nonparticipating residence, 55 dBA at the outside of any existing participating residence, 40 dBA at existing nonparticipating residences from substation equipment noise, and 55 dBA at any portion of a nonparticipating property except for wetlands and utility rights-of-way. Indeed, as noted by ORES staff, the draft permit incorporates these standards as enforceable permit conditions pursuant to 19 NYCRR 900-6.1(a) and 900-6.5(b).[90] ORES staff cite application exhibit 7 to note that in compliance with 19 NYCRR 900-2.8(b)(2), the application shows the projected sound levels at non-participating residences "would not exceed 45 dBA and the highest estimated sound levels for non-participating residences located adjacent to the proposed substation would not exceed 40 dBA."[91]

Consistent with these requirements, applicant explained that substations and inverters will be placed at a distance from nonparticipating residences — keeping noise levels "at or below existing background noise for much of the area around the Facility."[92] In March of 2021, applicant measured sound levels at four different monitoring locations for a period of five days.

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[89] Id.

[90] See draft siting permit at 12 and 60.

[91] See ORES staff substantive and significant issues brief at 49-50; DMM Item No. 25, application exhibit 7 (revision 1): Noise and Vibration at 7-2.

[92] See application exhibit 24 rev 2, at 24-7 to 24-8.

Application appendix 7-A shows noise contours and sensitive sound receptors and boundary lines for participating and non-participating parcels within 1,500 feet of noise sources that include the collection substation and PV array inverters in compliance with 19 NYCRR 900-2.8(c)(2).[93] ORES staff confirms applicant's analysis of operational noise and vibration measured from sensitive receptors within a 1,500-foot radius of any noise source design of the facility complies with the noise limit standards under 19 NYCRR 900-2.8(b)(2) to avoid, minimize and mitigate potential significant adverse impacts of operational noise to the maximum extent practicable.[94]

In the draft siting permit, ORES staff recommended granting limited relief from the Town Code "to the extent it requires no discernable difference from existing noise at the property line." ORES staff further clarified that applicant must comply with the noise standards set forth in 19 NYCRR 900-2.8 and noise-producing equipment must be located "on adjacent properties" in compliance with the Town Code.[95]

We agree with ORES staff that applicant has avoided, minimized, and mitigated operational noise from the proposed facility to the maximum extent practicable. ORES staff's determination to impose the noise limits under 19 NYCRR 900-

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93 See application exhibit 7 rev 1, at 7-3; id., appendix 7-A (revised figures).

94 See ORES staff substantive and significant issues brief at 50.

95 See draft siting permit at 6.

2.8(b)(2) is reasonable.[96] According to ORES staff, "(t)he health and safety of nearby residents is of paramount concern to the Office."[97] We agree with ORES staff that 19 NYCRR 900-2.8(b)(2) "provides a workable standard that is sufficiently protective of public health and safety."[98]

The Town fails to explain how 19 NYCRR 900-2.8(b)(2), or the limits imposed in the draft permit, do not address noise impacts from the facility, as noted by applicant.[99] Moreover, the Town failed to establish unmitigated adverse impacts associated with granting the partial waiver request pertaining to noise-producing equipment such as substations and inverters achieving "no discernable difference from existing noise levels at the property line." The Town of Clayton points to the harm that will result if the waiver is granted to local adjoining property owners with vested property and regulatory/zoning expectations and involving potential health risks, yet it fails to submit any evidence or argument to support such impacts.[100]

Ruling: Proposed issue of non-compliance with Clayton zoning law regarding noise does not meet the standards for adjudication.

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96 See applicant response at 24.

97 See ORES staff substantive and significant issues brief at 51.

98 See ORES staff substantive and significant issues brief at 53.

99 See Knapp affidavit at 11.

100 Id.

c. <u>Proposed issue of non-compliance with Clayton zoning law § 259-9.1(G) regarding decommissioning security</u>

Town Code § 235-9.1(G) states:

> The deposit, executions, or filing with the Town Clerk of cash, bond, or other form of security reasonable acceptable to the Town Attorney and/or Engineer, shall be in an amount sufficient to ensure the good faith performance of the terms and conditions of the permit issued pursuant hereto and to provide for the removal and restoration of the site subsequent to removal. The amount of the bond or security shall be 125% of the cost of removal of the large solar energy system and restoration of the property with an escalator of 2% annually for the expected life of the large solar energy system. In the event of default upon performance of such conditions, after proper notice and expiration of any cure periods, the cash deposit, bond, or security shall be forfeited to the Town of Clayton, which shall be entitled to maintain an action thereon. The cash deposit, bond, or security shall remain in full force and effect until restoration of the property as set forth in the decommissioning plan is completed. In the event of default or abandonment of the large solar energy system, the system shall be decommissioned as set forth in this section.

The Town relies on its offer of proof from Mr. Knapp to oppose waiving this provision. Mr. Knapp claims "the Town Committee determined 125% is an appropriate, reasonable factor to indemnify the Town in conjunction with an escalator." He also claims "(t)he 2% escalator was determined to be a reasonable proxy to protect the Town from inflation, that percentage deemed sufficient but reasonable by the Town, averaging below the CPI, COLA and or a multitude of indexes over the last decade." In Mr. Knapp's view, "insufficient bonds/funds for decommissioning is a potentially significant negative budgetary impact to the Town,

creating the inability to fund or enforce provisions of the decommissioning plan, adding harms emanating from unfunded enforcement tools."[101]

Applicant requested partial relief from the required amount of decommissioning security and the annual increase to the extent they exceed the requirements in 19 NYCRR 900-2.24(c) and 900-6.6(b). In its statement of justification to satisfy its burden of proof under Executive Law § 94-c(5)(e) and 19 NYCRR 900-2.25(c), applicant detailed how this local law was unreasonably burdensome in light of the CLCPA targets and the environmental benefits of the proposed facility. With respect to the degree of burden caused by this requirement, applicant objects to the proposed decommissioning security for a solar facility of 125% of the estimated decommissioning cost with a 2% annual escalation because it "substantially exceeds the ORES USCs for decommissioning."[102]

Applicant states that consistent with 19 NYCRR 900-2.24(c), the proposed decommissioning estimate "includes a 15% contingency, as outlined in Appendix 23-A." Applicant explains that the net decommissioning cost, including contingency, is approximately $2.5 million and that imposing the higher contingency "would add approximately $42,280 in additional costs to the project in year 1" because "an additional $611,350.95 in financial security on top of the $2.5 million security already required by ORES" would need to be obtained. Applicant further argues that in addition to these substantial added costs, the Town

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[101] See Knapp affidavit at 16.

[102] See application exhibit 24 rev 2, at 24-9.

Code increases the decommissioning security by 2% annually to account for inflation "even if actual costs decrease over the Facility's lifespan."[103]

With respect to why the burden should not be reasonably borne by applicant, applicant describes this added cost as "substantial." Applicant explains that the decommissioning security requirement would "put the security amount at $6,214,996.79 in Year 35 — nearly 2.5 times what ORES requires." Applicant seeks a waiver of the additional security "to the extent it exceeds that required by the USCs, on the grounds of the needs of or costs to ratepayers." Regarding whether design changes are feasible, applicant explained that "(t)his is not the type of requirement that could be accommodated by a design change to the Facility."

In the draft siting permit, ORES staff recommended granting limited relief and elected not to apply the requirements for the amount of decommissioning security (and annual increases thereto). ORES staff further clarified that applicant "shall provide decommissioning and site restoration security in amounts meeting the requirements set forth in 19 NYCRR 900-2.24(c), 900-6.6(b) and 900-10.2(b)."[104] ORES staff agreed with applicant that the Town Code's decommissioning contingency and inflation escalator is unreasonably burdensome given CLCPA targets and the environmental benefits to the facility. ORES staff and applicant agree that the added costs render the project less financially viable, adding significantly to the costs of renewable energy

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[103] See application exhibit 24 rev 2, at 24-9.

[104] See draft siting permit at 9.

production and driving up energy costs for consumers.[105]

We agree with ORES staff's determination to grant limited relief from the decommissioning security provisions of the Town Code. ORES staff confirms that the decommissioning and site restoration security amount comply with 19 NYCRR 900-2.24(c), 900-6.6(b), and 900-10.2(b) because applicant will provide an amount equal to the estimated cost of completing decommissioning and site restoration work, plus a 15% contingency.[106] The draft permit requires the submission of a final decommissioning and site restoration plan as a compliance filing pursuant to 19 NYCRR 900-10.2(b)(2). This requirement obligates applicant to update estimates before beginning construction, one year after starting operation, and every five years thereafter, with commensurate updates to financial security based on inflation or other cost increases.[107] ORES staff correctly compares such a comprehensive review process and adjustment of decommissioning costs to the Town's desired "2% annual escalator to adjust for inflation."[108]

Applicant contends, and ORES staff observes, that the 15% contingency required by 19 NYCRR 900-6.6(b) is sufficient to cover unanticipated expenses and that the request is the minimum necessary, incorporating "all overhead, contractor margin,

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[105] See ORES staff substantive and significant issues brief at 55; application exhibit 24 rev 2, at 24-9.

[106] See ORES staff substantive and significant issues brief at 55.

[107] See draft siting permit at 8-9.

[108] See ORES staff substantive and significant issues brief at 54-55.

expenses, fees, transportation, equipment, and labor to restore the facility to the most practical extent back to predevelopment conditions, with a 15% contingency to cover unforeseen expenses."[109] We agree. ORES staff notes that similar relief was granted in the final siting permit from the Barre town code in Hemlock Ridge, which provided for 125% decommissioning financial assurance and 2.5% annual escalator requirements.[110]

The Town did not show unmitigated adverse impacts associated with granting the limited relief for decommissioning and site restoration security in amounts meeting the requirements set forth in 19 NYCRR 900-2.24(c), 900-6.6(b) and 900-10.2(b). The Town neither offers evidence to show that the requirements for decommissioning security in the draft permit are insufficient nor explains why an additional amount is needed beyond the 15% contingency required under 19 NYCRR 900-2.24(c), 900.6.6(b), and 900-10.2(b). The Town's general concerns regarding the harm that could result from an inadequate decommissioning security amount are insufficient to raise a substantive and significant issue for adjudication.

Ruling: Proposed issue of non-compliance with Clayton zoning law regarding decommissioning security does not meet the standards for adjudication.

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[109] See application exhibit 24 rev 2, at 24-9; ORES staff substantive and significant issues brief at 54-55.

[110] See Hemlock Ridge, draft siting permit at 12.

d. Proposed issue of non-compliance with Clayton zoning law § 259-9.1(E)(1)(i) regarding impervious access roads

Town code § 235-9.1(E)(1)(i) states:

> Access. A road shall be provided to assure adequate emergency and service access. Maximum use of existing roads, public or private, shall be made. Access roads shall be gated at the point of connection with public roadways. Roadways within the site shall be built along field edges and along elevation contours where practical, constructed at grade and have a maximum width of 16 feet. Roadways shall not be constructed of impervious materials and shall be designed to minimize the extent of roadways constructed and soil compaction.

The Town of Clayton relies on its offer of proof from Mr. Knapp to claim that waiving the impervious material standard "would harm the integrity of the zoning law and rural character of the community, thus calling into question the Town Zoning District's regulatory status and standards, which emanate from the JCP, LWRP and CRCWRA." Mr. Knapp asserts that "(t)he potential impacts to the developer to adhere to this requirement would likely be a monetary positive as it would result in a material cost reduction, and would be associated with only minor additional construction maintenance."[111]

Applicant requested partial relief from this provision to the extent that impervious gravel payment or compacted crusher run and a limited application of impervious asphalt road aprons be allowed. In its statement of justification to satisfy its burden of proof under Executive Law § 94-c(5)(e) and 19 NYCRR 900-

[111] See Knapp affidavit at 12.

2.25(c), applicant detailed the reasons why this Town Code was unreasonably burdensome in light of the CLCPA targets and the environmental benefits of the proposed facility. Applicant objects to prohibiting impervious access roads because "the term impervious is unclear and may require a waiver if interpreted, for example, as the New York State Department of Environmental Conservation (NYSDEC) defines impervious under the stormwater regulations, which includes compacted gravel."[112]

Applicant points to application exhibit 5, design drawings, application appendix 5.11, and application exhibit 10, geology, seismology, and soils, to claim its proposed design of facility access roads ensures safety, access by fire and emergency vehicles, and operational functionality.[113] Applicant states that access roads will be constructed pursuant to industry standards, utilizing compacted gravel that is impervious, as defined by NYSDEC's regarding stormwater. Applicant emphasizes that access roads were designed "to avoid and minimize potential stormwater runoff and will be improved with features necessary to control stormwater, particularly as a preventative measure for surface erosion associated with higher-velocity surface water flows, utilizing best practices set forth in the Facility's Stormwater Pollution Prevention Plan (Appendix 13-C)."[114]

Regarding why the burden should not be reasonably borne

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112 See application exhibit 24 rev 2, at 24-10.

113 See application exhibit 24 rev 2, at 24-10; DMM Item No. 24, application exhibit 5 (revised): Design Drawings, part 1 of 6; DMM Item No. 10, application exhibit 13: Water Resources and Aquatic Ecology part 1 of 2.

114 Id.

by applicant, applicant explains that the waiver request is based on technical feasibility and matters of safety to ensure access to the site by facility and emergency services personnel. Applicant claims design changes to achieve compliance "are not feasible" as they could require installation of dirt access roads "or otherwise leave them in a substandard condition," impeding access by emergency services and creating stormwater runoff and erosion issues.[115]

Applicant asserts it has minimized potential impacts to the community to the maximum extent practicable. Applicant states it has limited its use of asphalt to "road aprons" and reduced the proposed width of access roads "from 20 to 16 feet to comply with local law."[116] In addition, applicant states that access roads have been designed to avoid and minimize stormwater runoff and will be improved as necessary to control stormwater, particularly to address surface erosion in accordance with the facility's Stormwater Pollution Prevention Plan. Finally, applicant confirms that removal and decompaction of access roads and aprons will occur as part of the decommissioning process.[117]

In the draft siting permit, ORES staff recommended limited relief with respect to the Town Code to the extent it

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[115] See application exhibit 24 rev 2, at 24-10; DMM Item No. 10, application appendix 13-C, stormwater pollution and prevention plan.

[116] See application exhibit 24 rev 2, at 24-10; applicant response at 26.

[117] See application exhibit 24 rev 2, at 24-10; DMM Item. No. 26, application exhibit 23 (revised): Site Restoration and Decommissioning.

applies to "impervious asphalt aprons as required by the applicable highway department(s)." ORES staff noted that "use of impervious gravel material may be allowed as required by subsurface conditions, or other applicable county, state or federal performance standards and/or laws, rules, regulations or code requirements." ORES staff further clarified that "this recommendation does not imply acceptance of the Permittee's remaining comments on the proposed Decommissioning and Site Restoration Plan, (i.e. which remains subject to final Office review and approval in compliance with 19 NYCRR §§ 900-10.1(a) and 900-10.2(b)." In the draft siting permit, SSC 6(a) also requires that consistent with 19 NYCRR 900-10.2, applicant prepare final design plans, profiles, and detail drawings that include access roads for review and approval by the Office as a mandatory pre-construction filing.[118]

ORES staff points to the importance of the facility's compliance with the New York State Uniform Fire Prevention and Building Code, the fire apparatus access road requirements in the 2020 Fire Code of New York State to protect the health and safety of all New Yorkers. ORES staff cites § 503 of the 2020 Fire Code, exception 2, which states: "Where approved by the fire code official, fire apparatus access roads shall be permitted to be exempted or modified for solar photovoltaic power generation facilities." ORES staff also cites § 503.2.3, which provides that the fire code official may require they "(b)e designed and maintained to support the imposed loads of fire apparatus and shall be surfaced so as to provide all-weather driving

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[118] See draft siting permit at 7 and 63.

capabilities."[119] Even Town Code § 235-9.1(B) states that "all solar energy systems shall be designed, erected and installed in accordance with the NYS Uniform Fire Prevention and Building Code," as noted by ORES staff.

With respect to Mr. Knapp's concern regarding using pervious material to "minimize hydrological impacts," ORES staff confirms the requirements under section 402 of the Clean Water Act that apply to the facility to address this issue.[120] ORES staff explains that "stormwater discharges from certain construction activities (including discharges through municipal separate storm sewer systems) are unlawful unless they are authorized by a National Pollutant Discharge Elimination System (NPDES) permit, or by an approved state permit program." ORES staff cite Hemlock Ridge as Office precedent for this process and explain that New York State complies with this federal law through an approved state permit program, the State Pollution Discharge Elimination System (SPEDES) permitting program administered by NYSDEC in accordance with the New York State Environmental Conservation Law (ECL) article 17, titles 7 and 9, and article 70. ORES staff further explains that an owner or operator of a construction activity complies with the Clean Water Act by operating under an individual SPDES permit that addresses stormwater discharges, or through coverage "under the State's General Permit (currently GP-0-20-001)." ORES staff confirms that all ORES siting permits are

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[119] See ORES staff substantive and significant issues brief at 64; 2020 Fire Code § 503.1.1, exception 2.

[120] See ORES staff substantive and significant issues brief at 64; Knapp affidavit at 12.

required to have a federally delegated SPDES general permit or SPDES individual permit.[121]

The record fails to establish unmitigated adverse impacts associated with granting the partial waiver request and allowing impervious gravel payment or compacted crusher run and a limited application of impervious asphalt road aprons. The Town does not explain the harm caused by applicant's limited use of asphalt for access road aprons or impervious compact gravel for constructing access roads, as ORES staff notes.[122] The Town also offers no evidence to support its claim that waiving the impervious material standard will result in harming the "integrity of the zoning law" and the "rural character of the community."[123]

ORES staff confirm that in addition to the final design drawings required by SSC 6(a)(1), condition 7.1(a) of the draft siting permit requires submission of copies of all federal and federally delegated permits and approvals. Also, the application lists a SPDES General Permit for Construction Activity as a required permit to address minimizing and avoiding hydrologic impacts from the facility.[124]

Ruling: Proposed issue of non-compliance with Clayton

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[121] See ORES staff substantive and significant issues brief at 64-65; ORES DMM Matter No. 21-00748, Matter of Hemlock Ridge Solar LLC, Decision of the Executive Director, Sept. 22, 2022, at 20-27.

[122] See ORES staff substantive and significant issues brief at 64.

[123] See Knapp affidavit at 12.

[124] See ORES staff substantive and significant issues brief at 65.

zoning law regarding impervious access roads does not meet the standards for adjudication.

e. Proposed issue of non-compliance with Clayton zoning law § 259-9.1(E)(1)(e) regarding screening (visual)

Town code §235-9.1(E)(1)(i) states:

> Screening. All large-scale solar energy systems shall have the least visual effect on the environment, as determined by the Joint Town/Village of Clayton Planning Board. Based upon site-specific conditions, including topography, existing structures, roadways, reasonable efforts shall be made to minimize visual impacts by preserving natural vegetation, and providing landscape screening to adjacent residential properties, public roads and from public sites known to include important views or vistas. Screening should minimize the shading of solar collectors. Appurtenant structures such as inverters, batteries, equipment shelters, storage facilities and transformers should be screened from adjoining residences.

The Town of Clayton agrees with ORES's recommendation in the draft permit to apply this provision, but the Town requests that the draft permit be modified "to require the visual impact mitigation measures" as stated in its offer of proof from Mr. Knapp.[125] Mr. Knapp's states:

> There will be impacts and degradation of the Town View-sheds. The project will impact all nearby residences, also sensitive receptors such as NYS Rt. 12 will be impacted, the route considered a 'Gateway' to the Town (LWRP, JCP) and a Town priority view-shed, all project associated roadway view-sheds are directly impacted as well. In all

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[125] See Town of Clayton petition at 18.

> of the Town's guidance and planning documents as well as Zoning, view-shed protection and enhancement in all areas is a priority. The Town holds to the tenants of the New York Open Space Plan and priorities regarding protecting view-sheds. These view-sheds are an integral part of the community character and in lieu of maintaining the conditions of the current view-shed due to the project only a robust, Town acceptable mitigation can be considered appropriate.

Mr. Knapp concludes that the "proposed screening, the screening locations or lack thereof" are insufficient mitigation.[126]

Applicant provided a statement of justification explaining that its proposed visual screening per application exhibit 8 and application appendix 8-A meets Town Code requirements and adequately minimizes impacts. Applicant requests partial relief from the Town Code to the extent that screening applies to all public roads on the grounds of costs and minimal impacts to the community. Applicant explains that the impacts of not screening facility components visible from certain roads (Wilder and Miller) are minimal because they are located "across from participating properties, adjacent Facility parcels improved with PV panel arrays and/or vacant land."[127]

To sustain its burden of proof under Executive Law § 94-c(5)(e) and 19 NYCRR 900-2.25(c), applicant relies on Table 24-0B, Landscape Screening Cost Estimates, to demonstrate the degree of burden caused by this requirement. Applicant explained that

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[126] See Knapp affidavit at 17.

[127] See application exhibit 24 rev 2, at 24-11 to 24-12; DMM Item No. 32, application exhibit 8 (revision 2): Visual Impacts part 2 of 2, attachment D revised landscape mitigation plan.

adding screening "along all public roads" would "more than triple the total cost" of the vegetative screening as detailed in its proposed screening plan (application exhibit 8 and application appendix 8-A) — $1,584,338 instead of $510,702. With respect to why the burden cannot reasonably be borne by applicant, applicant discussed that requiring additional vegetative screening beyond the landscape mitigation plan is unnecessary given the "lack of residences or viewpoints at which viewers would be spending any length of time." According to applicant, the proposed landscape plantings and existing natural vegetative screening as shown in the landscape mitigation plan demonstrates that significant adverse visual impacts have been mitigated to the maximum extent practicable. Applicant further notes that traffic is minimal on the identified roads (Wilder and Miller) and the views of motorists passing by the facility would be brief and limited.[128]

In the draft permit, ORES staff denied applicant's request for relief from the town code. ORES staff directed applicant to comply with the Town Code and with the requirements under 19 NYCRR 900-2.9 to avoid, minimize, and mitigate potential significant adverse visual impacts of the proposed facility to the maximum extent practicable. ORES staff further determined that "(t)he revised planting plans shall be included in the Final Visual Impacts Minimization and Mitigation Plan." Consistent with 19 NYCRR 900-10.2 and 900-6.4(1) and (2), SSC 6(c) requires applicant to submit a final visual impacts minimization plan that includes screen planting plans that meet the requirements of the

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[128] See application exhibit 24 rev 2, at 24-11 to 24-12; DMM Item No. 32, application exhibit 8 (revision 2): Visual Impacts part 2 of 2, attachment D revised landscape mitigation plan.

Town Code.[129]

We agree with ORES staff that denial of applicant's request for relief is appropriate. Applicant failed to demonstrate that compliance would be unreasonably burdensome in light of CLCPA targets and the environmental benefit of the proposed facility. ORES staff properly determined that the proposed screening did not comply with the Town Code regarding landscape screening to public roads or the standard under 19 NYCRR 900-2.9 to avoid, minimize, and mitigate potential significant adverse impacts to visual resources to the maximum extent practicable. ORES staff properly rejected applicant's arguments that costs and limited traffic along roadways render compliance unreasonably burdensome. ORES staff correctly observed that applicant's estimate for "additional plantings along public roads" shows design changes are possible, with sections along those roads remaining "unmitigated by existing or proposed screening."[130] We conclude that applicant has not raised an adjudicable issue with respect to the town code screening requirements.

We further determine that the Town failed to raise a substantive and significant issue requiring adjudication. ORES staff does not propose to waive the Town Code. The Town failed to identify facts to raise a substantive and significant issue for adjudication regarding visual screening. Therefore, no factual dispute exists. According, an evidentiary hearing is not

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129 See draft siting permit at 7-8, 63-64.

130 See ORES staff's substantive and significant issues brief at 67-68; application exhibit 8 rev 2, attachment D revised landscape mitigation plan.

required. While Mr. Knapp requested additional visual mitigation measures for the visual mitigation plan to comply with the Town Code, draft siting permit SSC 6(c) already requires such compliance.[131]

Ruling: Proposed issue of non-compliance with Clayton zoning law regarding screening (visual) does not meet the standards for adjudication.

4. Other Issues

a. Final Net Conservation Benefit Plan (NCBP)

The Town of Clayton relies on its offer of proof from Mr. Knapp to assert that the draft permit fails to avoid or mitigate adverse impacts to avian species and account for "local priorities for preventing habitat loss and fragmentation."[132] Mr. Knapp claims proposed mitigations are not "maximized to the extent practicable." Mr. Knapp describes the specific area involved as "in and around this project" and an "IBA (Important Bird Area), and within a DEC GBCC (Grassland Bird Conservation Center) or is or eligible as a GFA (Grassland Focus Area) per DEC GBHC 22-27" that provides "high quality habitat for multiple Federal and NYS Endangered or threatened species." He states:

> While there is proposed mitigation rations by the applicant, there are no specifics as to the type, quality and locations of such mitigations. The Town would suggest the plain language of DEC GBHC

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131 See 19 NYCRR 900-8.2(b)(2) and 900-8.3(c)(3); applicant response at 31.

132 See Town of Clayton petition at 23.

> 22-27 and the PPGNY[133] requires the avian mitigation to be robust, continuous, and within the GBCC and/or GFA, for maintaining the overall grasslands quality as well as to mitigate the key stressor of fragmentation degradation of the grasslands. The Town would note that preventing fragmentation is an underlying goal for all terrestrial fauna and flora as well as avian species in the Township.[134]

Pursuant to subpart 6(b) of the draft permit, ORES staff recommended the preparation of a final net conservation benefit plan (NCBP) to mitigate for impacts to breeding and wintering habitat of two species of threatened and endangered grassland birds. That SSC states:

> **Final Net Conservation Benefit Plan (NCBP)** – Consistent with 19 NYCRR §§ 900-10.2 and 900-6.4(o)(3), the Permittee shall submit a final NCBP, developed in consultation with the Office. The Permittee's proposed NCBP remains under review (DMM 32, Exhibit 12: NYS Threatened or Endangered Species, Appendix 12-E: Revised NCBP), and the Determination of Occupied Habitat, Incidental Take and Net Conservation Benefit, issued by the Office on August 30, 2021, remains in effect (DMM 32, Exhibit 12: NYS Threatened or Endangered Species, Appendix 12-D: Determination of Occupied Habitat, Incidental Take and Net Conservation Benefit).

Applicant claims it fully assessed avian impacts and any mitigation that will be provided will be in accordance with a final NCBP as a compliance filing, which is a required SSC under 6(b) of the draft permit. In responding to public comments on the

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[133] See ORES staff substantive and significant issues brief at 83-84, citing NYSDEC report "Plan for Preserving Grassland Birds in New York" (PPGBNY).

[134] See Knapp affidavit at 19-21.

Perch River Wildlife Management Area and Perch Lake Important Bird Area, applicant points out that these resources "were accounted for and evaluated" in exhibits 3, 11, and 12 of the application. Applicant confirms that the facility is not "proposed within or in close proximity to the Perch River Wildlife Management Area (WMA)," which is 1.8 miles south of the facility and managed by NYSDEC. Applicant asserts there are no anticipated impacts to this WMA given this distance and that the facility "is sited within agricultural fields, which provide low quality habitat for grassland birds."[135]

Applicant points out, and ORES staff observes, that it conducted "extensive pre-application wildlife surveys and prepared a wildlife characterization study to assess the potential impact of the project on wildlife, including threatened and endangered species" within a five-mile radius of the facility site. ORES staff explains that in consultation with NYSDEC, and pursuant to 19 NYCRR 900-1.3(g)(1) and 900-2.13(a), it evaluated the Wildlife Site Characterization Report. This process, according to ORES staff, involved considering existing public information on bird, bat, and many other species. It also involved assessment of the facility's distance from the Perch River WMA and location within the Perch River Complex IBA and St. Lawrence River Valley Grassland Focus Area.[136]

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[135] See applicant response at 41.

[136] See ORES staff substantive and significant issues brief at 85; DMM Item No. 6, application exhibit 12: NYS threatened or endangered species, appendix 12-A wildlife site characterization report, 3.3.1 special status lands; applicant response at 42.

ORES staff also notes that applicant completed detailed avian surveys to assess the potential impacts to NYS threatened and endangered grassland bird species. ORES staff, in consultation with NYSDEC, reviewed applicant's Breeding Bird Survey Report and Winter Grassland Raptor Survey Report and issued a Determination of Occupied Habitat, Incidental Take and Net Conservation Benefit requiring the preparation of a NCBP to mitigate impacts "to occupied breeding and wintering habitat for two state-listed grassland bird species."[137] The report identified Indiana bat maternity roosts located within 2.5 miles of the facility site. To avoid impacts to this federally and NYS endangered species threatened by white-nose syndrome, applicant sited facility components to avoid clearing contiguous forest areas, as explained by ORES staff. In its determination, ORES staff also required that construction "adhere to the tree clearing limitations in its USCs at §900-6.4(o)(4)(iv)." ORES staff further determined that the facility "shall adhere to the additional construction, restoration and maintenance USCs at §§ 900-6.4(o)(3)(i)-(vii)."[138]

ORES staff also points out that in consultation with NYSDEC, it conducted "analyses of the Applicant's exhibit 11: Terrestrial Ecology (19 NYCRR §900-2.12)" and "Applicant's Exhibit

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[137] See ORES staff substantive and significant issues brief at 85; application exhibit 12, appendix 12-C breeding bird survey report, appendix 12-B wintering grassland raptor survey report, and appendix 12-D pre-application consultation.

[138] See ORES staff substantive and significant issues brief at 85-86; draft siting permit subpart 5.4, at 30-32 and 35-36.

12: NYS T&E Species (19 NYCRR §900-2.13)." ORES staff determined that "potential significant adverse impacts to other species had been avoided, minimized and mitigated to the maximum extent practicable" and required SSC 6(b) to "ensure a net conservation benefit to the impacted grassland bird species in compliance with Executive Law § 94-c(3)(d)."[139]

Applicant proposed a preliminary NCBP as required under 19 NYCRR 900-6.4(o) that ORES staff agreed would "offset the identified impacts to the identified T&E species, and, over the course of the Facility's operational period, will provide a benefit to the species exceeding adverse effects." To comply with 19 NYCRR 900-6.4(o)(3)(ix), wintering grassland T&E species would be mitigated at 1:1 ratio, and breeding T&E species would be mitigated at a 2:1 ratio. ORES staff, in consultation with NYSDEC, determined the facility will "impact 287.1 acres of occupied habitat for two wintering T&E grassland bird species, and 350.0 acres of occupied habitat for one breeding T&E grassland species." As observed by applicant and ORES staff, ORES regulations require applicant to provide a net conservation benefit to threated and endangered grassland bird species.[140]

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[139] See ORES staff substantive and significant issues brief at 86; DMM Item No. 25, application exhibit 11 (revision 1): Terrestrial Ecology; DMM Item No. 6, application exhibit 12: NYS Threatened or Endangered Species at 12-6; DMM Item No. 32, application exhibit 12 (revision 2): NYS Threatened or Endangered Species, appendix 12-E; notice of incomplete application, November 12, 2021; notice of incomplete application #2, March 21, 2022.

[140] See applicant response at 42; ORES staff substantive and significant issues brief at 87.

We agree with ORES staff and applicant that there are no substantive and significant issues regarding avian species and SSC 6(b) that require adjudication. ORES staff correctly point out that neither the Town nor the public comments identify facts contrary to the application or draft permit, or that those documents contain defective information or omit information.[141]

Ruling: Proposed issue regarding avian species does not meet the standards for adjudication.

b. Environmental benefits of the facility

The Town of Clayton relies on the affidavit of Mr. Campany to question the environmental benefits of the facility and dispute ORES staff's claim in subpart 2 of the draft siting permit that the facility will "produce enough zero-emissions energy to power more than 27,000 households." Mr. Campany used predictive modeling software that showed "a 119 MW solar array using east/west tracking devices can be expected to produce approximately 1.17 kWhrs of electricity per installed DC watt of solar collector with assumptions of typically currently available 535-watt modules using East/West tracking as indicated in the application materials." According to Mr. Campany, this would result in "an average annual production of 139 MWhrs[142] *sic* of electricity per year." Mr. Campany relies on "(d)ata from New

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[141] See ORES staff substantive and significant issues brief at 87.

[142] See ORES staff substantive and significant issues brief at 93 (ORES staff point out an error in the units presented by Mr. Knapp and point out that the average annual production "should be 139 GWh or 139,000 MWh.")

York State" that he claims indicates an "average annual residential electricity consumption of 599 kWhrs per month, or 7,199 kWhrs per year per household" to conclude the system "would produce enough energy for 19,400 homes, or 28% less than the stated amount of 27,000 homes."[143]

Applicant observes that Mr. Campany's calculation of the 19,400 homes powered by a 119 MW facility contains "a mathematical error in the conversion from alternating current to direct current which substantially underestimates energy generation from the Facility." Applicant explained that the facility is proposed to be 119 MW "in alternating current capacity (MW-AC)" that must be "converted to direct current capacity (MW-DC) to calculate the output" using Mr. Campany's metrics. Applicant claims Mr. Campany should have used the DC capacity of the facility at approximately 154 MW-DC for his calculations instead of 119 MW-AC, as confirmed in appendix 5-A of the application, design drawings, sheet E600.[144]

Applicant further claims that even if Mr. Campany's calculations were accurate, such a mistake would be "non-material" considering the many benefits of the project. Those benefits include, according to applicant, socioeconomic (application exhibit 18), grassland habitat conservation (application exhibit 12), public health - cleaner air and reduced greenhouse gas emissions (application exhibits 6 and 17), and conservation or other benefits (application exhibits 12 and 14). Regardless of the precise number of homes that could be powered, applicant

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[143] See Town of Clayton petition at 20; Campany affidavit at 4.

[144] See applicant response at 35; DMM Item No. 4, application exhibit 5, Design Drawings, sheet E600.

accurately notes that stating a facility's renewable energy production "in terms of the number of homes it would power" is standard practice to "help members of the public understand the size and scope of the project."[145]

ORES staff also notes the "DC/AC production ratio used for the proposed Facility" to suggest that Mr. Knapp "may underestimate the generation production of the proposed facility." ORES staff explains that multiplying the DC/AC production ratio of 1.36 shown in the equipment schedule in design drawing E600 by the proposed 119 MW-AC capacity "results in approximately 162 MW(DC) capacity." According to ORES staff, this capacity used with Mr. Campany's presumed production of "117 kWH per installed DC watt" results in energy production "closer to 189 GWh" or a value "in line with what the Applicant presented."[146]

While ORES staff finds Mr. Campany's figure of 7,188 kWh per household to represent the average annual residential electric consumption reasonable based on data from the U.S. Energy Information Administration, staff's calculations using applicant's bid quantity of 236,634 MWh (applicant's 2020 NYSERDA RES Tier 1 solicitation bid) show a figure that is significantly higher than Mr. Campany's 19,400 figure. ORES staff explain that "an annual generation of 236,634 MWh" and "average annual consumption of 7,188 kWh," means the facility could power "32,900 households."

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[145] See applicant response at 35-36.

[146] See ORES staff substantive and significant issues brief at 94; application exhibit 5, sheet E600.

This number, ORES staff observes, "compares favorably with the Applicant's presented 27,000 households."[147]

ORES staff further explain that energy power "output of the Facility is variable and subject to change" over time. Moreover, ORES staff also points to applicant's application exhibits 17 (consistency with energy planning objectives) and 18 (socioeconomic effects) that detail the benefits of the project to claim the project "will contribute meaningfully to the energy policy objectives of the State and the CLCPA targets" regardless of the number of households receiving renewable energy power.[148]

We agree with ORES staff and applicant that the Town did not present substantive and significant issues regarding environmental benefits of the facility that require adjudication. The Town has not shown that a substantive and significant issue exists. Even if the draft permit stated an error regarding the number of homes that could be powered by the project, such an error would not raise a substantive and significant issue. The evidence demonstrates several benefits of the facility that meet the requirements of Executive Law § 94-c, none of which the Town mentions.

Ruling: Proposed issue regarding environmental benefits of the facility does not meet the standards for adjudication.

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[147] See ORES staff substantive and significant issues brief at 93, citing https://data.ny.gov/energy-environment/large-scale-renewable-projects-reported-by-NYSERDA/dprp-55ye and https://www.eia.gov/electricity/sales_revenue_price/Summary_Table_5.b.

[148] See ORES staff substantive and significant issues brief at 94.

c. Emergency response plan

The Town of Clayton relies on its offer of proof from Mr. Campany to claim that the draft plan in the application and draft permit is insufficiently detailed to provide an adequate emergency response plan.[149] Mr. Campany claims a "detailed emergency response plan with regular training is critical to provide the best emergency response possible to the site." Mr. Campany asserts that the volunteer fire departments serving the area have "limited knowledge of commercial solar installations and equipment." He also raises concerns regarding proper maintenance of access roads to major equipment to allow for emergency vehicles to respond to emergencies, particularly during snow season.[150]

Applicant observes that contrary to Mr. Campany's concerns regarding the inadequacies of the emergency response plan in the application, there is no such plan contained in the application. Under 19 NYCRR 900-2.7(c), application exhibit 6: public health, safety and security, an applicant is required to submit a statement and evaluation that addresses, among other things, "a Safety Response Plan to ensure the safety and security of the local community." Applicant asserts it met these requirements in its application by providing the Site Security Plan and Safety Response Plan (application appendix 6-B) to local fire departments and emergency responders that incorporate annual training and account for consultation with local fire officials and solicitation of their feedback. Applicant also disputes the

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[149] See Town of Clayton petition at 22.

[150] See Campany affidavit at 8-9.

Town's description of local fire departments as having "limited knowledge" of solar facilities and equipment based on its interactions with local fire officials, all of whom have demonstrated familiarity with solar facilities and general acceptance of the site security and safety response plans. Applicant also emphasized its ongoing consultations with local fire departments to address any necessary revisions to the plans.[151]

ORES staff agrees that "suitable access is required to ensure that emergency response personnel can respond in a timely and safe fashion to emergencies at the Facility site" but confirms that applicant's safety response plan "includes provisions for testing and training of the plan."[152] ORES staff observes that "(a)ll major renewable facilities are required to comply with applicable substantive provisions of the New York State Uniform Fire Prevention and Building Code promulgated by the New York State Department of State, State Fire Prevention and Building Code Council," which includes the 2020 Fire Code of New York State. In addition to these safeguards, ORES staff also observes that 19 NYCRR 900-6.1(d)(3) authorizes the Town to implement the New York State Uniform Fire Prevention and Building Code, including § 503 pertaining to the surface design of access roads. ORES staff conclude that the draft permit "contains

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151 See applicant response at 38-39.

152 See ORES staff substantive and significant issues brief at 95, citing 19 NYCRR 1219.1, New York State Uniform Fire Prevention and Building Code.

sufficient controls to ensure that the proposed Facility is designed and constructed in a manner which ensures suitable all-weather access to the Facility."[153] Indeed, as discussed above, SSC 6(a) requires final design plans, profiles, and detail drawings that include access roads.[154]

We agree with ORES staff and applicant that the Town has failed to identify a substantive and significant issue regarding the plans or access roads that warrants adjudication. Applicant's general concerns regarding emergency response plans and access roads are insufficient to establish an adjudicable issue.

Ruling: Proposed issue regarding emergency response plan does not meet the standards for adjudication.

d. Local roads

The Town of Clayton claims compliance requirement 7.1(e)(8)(iv) as a condition in the draft permit "is insufficient to mitigate or avoid impacts to local results *sic* resulting from construction of the facility." According to the Town, "if any" stated in the provision specifically "contemplates that road use and restoration agreements may not always be required."[155] That condition requires a traffic control plan as a pre-construction filing that includes:

> A copy of all road use and restoration agreements, if any, between the Permittee and landowners, municipalities, or other entities, regarding repair

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[153] See ORES staff substantive and significant issues brief at 95-96.

[154] See draft siting permit at 63.

[155] See Town of Clayton petition at 22.

> of local roads damaged by heavy equipment, construction or maintenance activities during construction and operation of the facility.[156]

The Town relies on its offer of proof from Mr. Campany to claim "(a) complete assessment of the local roads and responsibility for repair by the developer should be completed prior to the commencement of any work." According to Mr. Campany, prior solar projects locally "resulted in extensive damage to roadways and drainage systems, requiring post project repair." Mr. Campany requests that the final permit include "a requirement that the applicant *sic* fille *sic* execute road use agreements or approved road use permits prior to commencing construction."[157] The Town also requests that "if any" be removed from the permit condition.[158]

Applicant observes that exhibit 16 of the application provides an assessment of local roadways that "includes a description of the pre-construction characteristics of the public roadways and a discussion of load bearing and structural information where available." Exhibit 16 states:

> TSEC will repair damage to the approved haul routes sustained during the construction of the Facility to a condition equal to or better than the roadway's condition prior to construction, consistent with the Traffic Control Plan and Road

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156 See draft siting permit at 70; Town of Clayton petition at 22.

157 See Town of Clayton petition at 22; Campany affidavit at 9.

158 See Town of Clayton petition at 23.

> Use Agreements, to be negotiated with the host towns and the County.

Applicant also confirmed it "anticipates negotiating local Road Use Agreements (RUAs) with the host Towns," which will address the Town's concerns.[159]

ORES staff points to draft permit condition 7.1(e)(8)(iv), which requires a Traffic Control Plan as a pre-construction filing that includes any road use and restoration agreements.[160] ORES staff explains that if applicant indicates that RUAs are not needed, applicant must "provide a statement" with "supporting documentation demonstrating that the Applicant has appropriately consulted with relevant agencies," otherwise "the Office's RUA requirements are an enforceable condition of any Siting Permit."[161]

We agree with ORES staff and applicant that the Town has failed to raise a substantive or significant issue regarding local roads for adjudication. As both ORES staff and applicant observe, there is no dispute regarding applicant's obligation to comply with the RUA requirements and conditions provided in the draft permit and the Town has failed to show that a modification or denial of the draft permit is required.[162] ORES staff also notes

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159 See applicant response at 39.

160 See ORES staff substantive and significant issues brief at 97; draft siting permit at 70.

161 See ORES staff's substantive and significant issues brief at 98.

162 See ORES staff substantive and significant issues brief at 98; applicant response at 39.

applicant's ongoing discussions with "local, county and NYSDOT officials regarding road permits and protection agreements." We agree with ORES staff that these controls "ensure that the proposed Facility is constructed in a satisfactory manner."

Ruling: Proposed issue regarding local roads does not meet the standards for adjudication.

e. Proof of host community benefit

Executive Law § 94-c(5)(f) states:

> The final siting permit shall include a provision requiring the permittee to provide a host community benefit, which may be a host community benefit as determined by the public service commission pursuant to section eight of the chapter of the laws of two thousand twenty that added this section or such other project as determined by the office or as subsequently agreed to between the applicant and the host community.

The Office's regulations at 19 NYCRR 900-6.1(f) require applicant to "provide host community benefits, such as Payments in Lieu of Taxes (PILOTs), other payments pursuant to a host community agreement or other project(s) agreed to by the host community."

The Town of Clayton claims compliance filing requirement 7.1(J) in the draft permit "does not provide sufficient detail about the kind of 'documentation' that must be provided to demonstrate host community benefits will be provided." The Town questions whether modifying the draft permit is appropriate to require applicant to file "specific documents, including an

executed Host Community Agreement for both host municipalities, as well as an executed PILOT agreement."[163]

Applicant observes that "Payment-in-Lieu-of-Taxes (PILOT) and Host Community Agreements (HCAs) fall outside of ORES's jurisdiction as adjudicable issues." Applicant asserts that an adjudicatory hearing is unnecessary since the Town's objections concern interpretation of a regulatory provision.[164]

ORES staff cites condition 7.1(j) of the draft permit requiring that "(d)ocumentation of all host community benefits [shall] be provided by the Permittee" and claims that this documentation must be provided "to the Office as a mandatory preconstruction compliance filing in compliance with 19 NYCRR §§ 900-10.2(j) and 900-10.1(a)."[165] Application exhibit 18: Socioeconomic Effects, details the host community benefits that the proposed facility will provide to the Towns of Clayton and Orleans and the La Fargeville Central School District, as pointed out by ORES staff. ORES staff summarizes the host community benefits to also include paying "special district taxes to the Orleans Fire District, Highway Item No. 1, Clayton Ambulance, and the Clayton Fire District."[166] ORES staff also cites as benefits "the creation of an estimated average of 167

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[163] See Town of Clayton petition at 23.

[164] See applicant response at 40.

[165] See ORES staff substantive and significant issues brief at 100; draft siting permit at 73.

[166] See ORES staff substantive and significant issues brief at 100; DMM Item No. 26, application exhibit 18 (revision 1): Socioeconomic Effects at 18-8 to 18-9, 18-13 to 18-14.

full time equivalent jobs during construction with an estimated $24.8 million in annual earnings, an estimated 3 full time equivalent jobs during operation with an estimated $270,000 to $330,000 in annual earnings, a PILOT agreement, the EDF Renewables Trades and Clean Energy Scholarship Program, local and regional spending, and a host community agreement." ORES staff confirms applicant's estimate that the PILOT agreement would provide the taxing jurisdictions with approximately $297,000 annually, which would increase by 2% each year.

We note that based on the positive socioeconomic impacts to host communities, ORES staff's projection of "an estimated net increase in local revenues" is accurate.[167] We conclude that the Town failed to raise a substantive or significant issue regarding host community benefits. The HCA requirement contained in the draft permit is an enforceable permit condition. This condition, as explained by ORES staff, includes "contractual requirements which shall be determined based upon good faith negotiations between the Applicant, the Town of Clayton and the Town of Orleans, taking into account the terms and conditions" discussed with the community.[168]

Ruling: Proposed issue regarding proof of host community benefit does not meet the standards for adjudication.

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167 Id.

168 See ORES staff substantive and significant issues brief at 101.

VI. Conclusion

We hold that there are no issues joined for adjudication. Therefore, an adjudicatory hearing in this matter is not necessary. Accordingly, the Town of Clayton's petition for party status is denied, and the matter is remanded to ORES staff, which is directed, pursuant to 19 NYCRR 900-8.3(c)(5), to continue processing the application to issue the requested siting permit consistent with this ruling.

(SIGNED) ERIKA BERGEN
Administrative Law Judge
Department of Public Service
3 Empire State Plaza
Albany, New York 12223
erika.bergen@dps.ny.gov

(SIGNED) DAWN MacKILLOP-SOLLER
Administrative Law Judge
Office of Renewable Energy Siting
W. A. Harriman Campus
Building 9, 4th Floor
1220 Washington Avenue
Albany, NY 12226
518.473.9946
dawn.mackillop-soller@ores.ny.gov